COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 057107-99**

Patricia Mallas	Employee
Favorite Nurses	Employer
Fireman's Fund Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Carroll and Costigan)

APPEARANCES
Joseph F. Agnelli, Jr., Esq., for the employee
Gerard A. Butler, Esq., for the insurer

HORAN, J. The insurer appeals an administrative judge's decision to award weekly indemnity benefits[1] to the employee for a hernia condition. (Dec. 6-9.) The judge found the employee's hernia was caused and/or aggravated by a lifting incident at work on October 21, 1999. (Dec. 5-7.) The insurer raises four issues on appeal, one of which concerns the application of § 1(7A)**.**[2] Because the decision lacks sufficient subsidiary findings on that issue, we vacate the award of benefits, and recommit the case.

We recite only the facts material to the § 1(7A) issue. The employee testified she suffered her first hernia injury in 1991 while working in Florida**.**[3]

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[1] The employee was awarded ongoing §35 benefits following the payment of closed periods of §35 and §34 benefits. The insurer was also ordered to pay medical benefits and counsel fees.

[2] The insurer raised §1(7A) at hearing. (Tr. 7-8.) Employee's counsel did not object to its consideration as an issue. Id. Section 1(7A) provides, in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

[3] The decision makes no mention of the employee's 1991 injury and surgery, but the judge expressly found the employee to be a credible witness. (Dec. 4.)

(Tr. 22-24, 91.) She underwent her first surgical repair in 1991. (Tr. 21-22, 91-92.) In 1994, while still in Florida, she was working with a heavy patient and aggravated the hernia; she underwent a second surgery. (Tr. 92-93.) The employee then relocated to Massachusetts, and commenced work with the employer in June 1999. (Dec. 4; Tr. 98.) She alleged a third hernia injury occurred on October 21, 1999, when she attempted to support a patient at work. (Dec. 5-6.)

All four doctors relied upon by the administrative judge agree the employee's 1999 work injury was either an aggravation or recurrence of her prior hernias. (Dec. 5-6.) While the hearing decision lists § 1(7A) as an issue, there are no findings addressing it. The employee agrees the issue was properly before the court.[4] We therefore vacate the award of benefits, and recommit the case for further findings of fact on the issue of § 1(7A).[5] See Vieira v. D'Agostino Assoc., 19 Mass. Worker's Comp. Rep. ___ (March 15, 2005).

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

[4] "Section 1(7A) applies when an employee has a pre-existing condition that is not compensable under M. G. L. Chapter 152. In this instance Employee was initially injured while residing in Florida, which renders Section 1(7A) applicable." (Employee's supplemental brief 2.)

[5] In view of our order of recommittal, we do not reach the insurer's remaining appellate issues.

CARROLL J., (concurring). Since the parties agree that § 1(7A) applies, the application of § 1(7A) is being treated as the law of the case, see Haberger v. Carver, 297 Mass. 435, 440 (1937), and we therefore do not reach the issue. See also Dalton v. Post Publishing Co., 328 Mass. 595, 599 (1952) (waiver of a defense may occur expressly or by implication regardless of its merits). The reviewing board has also applied the doctrine of "law of the case." See, e.g., Page v. O.P. Viau & Sons, 14 Mass. Workers' Comp. Rep. 143, 146-147 (2000); Messinger v. Bethlehem Steel Corp., 13 Mass. Workers' Comp. Rep. 309, 313, n.4 (1999); Davis v. Cumberland Farms, 12 Mass. Workers' Comp. Rep. 526, 528 n.3 (1998).

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Martine Carroll
Administrative Law Judge

Filed: May 26, 2005